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Brief for Plaintiff in Error

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IN THE SUPREME COURT OF THE UNITED STATES.

FROM THE SUPREME COURT OF TENNESSEE.

W. E. ADDELN

v.

STATE.

BRIEF FOR PLAINTIFF IN ERROR

IN THE SUPREME COURT OF THE UNITED STATES.

W. B. AUSTIN

vs.

STATE OF TENNESSEE.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a criminal case that is here by writ of error from the Supreme Court of Tennessee. It originated in the Circuit Court of Monroe County, Tennessee, and is based on an indictment by the grand jury of that county of the plaintiff in error for selling cigarettes. The statute that the indictment charged the plaintiff in error with violating is Chapter 30 of the Acts of 1897 of the General Assembly of Tennessee, the material portion of which statute is as follows:

> Be it enacted by the General Assembly of the State of Tennessee, That it shall be a misdemeanor for any person, firm or corporation to sell, offer to sell or to bring into the State for the purpose of selling, giving away, or otherwise disposing of any cigarettes, cigarette paper or substitute for the same; and a violation of any of the provisions of this act shall be a misdemeanor punishable by a fine of not less than fifty dollars.
>
> Be it further enacted that the Grand Juries shall have inquisitorial power over offenses committed under this act.

There was a verdict of guilty by the Circuit Court of Monroe County, and the plaintiff in error was fined $50 and adjudged in custody until the fine was paid.

He appealed to the Supreme Court of Tennessee, and that Court, on November 19th, 1898, affirmed the judgment of the Circuit Court of Monroe County. The plaintiff in error prosecuted a writ of error from the Supreme Court of Tennessee to this Court, the writ of error having been allowed on December 29th, 1898, by D. L. Snodgrass, Chief Justice of the Supreme Court of Tennessee. On the same day the plaintiff in error gave bond, the amount of whose penalty and the solvency of whose sureties were approved by D. L. Snodgrass, Chief Justice. On the same day a citation was issued by Chief Justice Snodgrass, and service of the same was acknowledged by G. W. Pickle, Attorney-General of Tennessee. The plaintiff in error has filed his assignment of errors in this Court.

STATEMENT OF FACTS.

There is no contention as to the facts of this case: Plaintiff in error was a resident of and a merchant in Madisonville, Monroe County, Tennessee, in November, 1897. He was in no way connected with the American Tobacco Company, as agent or otherwise. The American Tobacco Company was at that time a corporation of the State of New Jersey, having a factory for the manufacture of cigarettes in Durham, North Carolina, and factories at other points in the United States, but having no factory, office nor warehouse in the State of Tennessee. In November, 1897, the American Tobacco Company manufactured at its factory in Durham some cigarettes, and packed these cigarettes into pasteboard

slide boxes; each box contained ten cigarettes and had printed on its outside the name and number of the factory, the internal revenue district in which said factory was located, the number of cigarettes contained in the box, the internal revenue stamp and "caution notice" required by the laws of the United States; the internal revenue stamp was pasted across its end so as to act as a seal on said box, and the stamp had to be destroyed before the contents of the box could be removed. The boxes of cigarettes in all respects complied with the requirements of the United States statutes and regulations governing the packing and sale of cigarettes. A number of these packages were by said American Tobacco Company shipped to the plaintiff in error from Durham, North Carolina, to Madisonville, Monroe County, Tennessee. The shipment from Durham to Madisonville was in this way: The American Tobacco Company piled on the floor of its factory in Durham, North Carolina, a number of these separate packages without any covering, box, bag or wrapping of any kind; an agent of the Southern Express Company, a common carrier which operated into and through the States of North Carolina and Tennessee, came and gathered up the packages and placed them in an open basket, which open basket was not theretofore in possession of the American Tobacco Company, but had theretofore been in possession of said Southern Express Company. These separate packages were by said express company brought in its car and in its basket to Madisonville, Tennessee, and there an agent of the express company took this basket full of these packages to the place of business of plaintiff in error and poured the packages from the basket onto the counter of the plaintiff in error and took the basket away with him. The basket was neither

delivered by the shipper to the express company nor was it delivered by said express company to the consignee. One of the packages thus received by plaintiff in error he sold, without in any way breaking or changing its form, to W. C. Brown, an adult resident of Monroe County, Tennessee. This sale was made on November 1st, 1897, and it is the only sale alleged or proven to have been made by plaintiff in error. There was no other testimony.

CONTENTION OF PLAINTIFF IN ERROR.

Upon the facts shown by the testimony and set out above, plaintiff in error contended in the Circuit Court of Monroe County that the statute under which he was indicted, so far as it was sought to be applied to his act and the sale made by him, was void, because in contravention of the Constitution of the United States, and especially of that clause of the Constitution of the United States which provides that Congress shall regulate commerce among the States. Plaintiff in error contended that the package of cigarettes sold by him was an import, and that by no act or change of condition had it lost its character as an import, and that therefore an attempt to forbid or regulate its sale by a State Statute is an invalid exercise by the State Legislature of a prerogative belonging exclusively to Congress. Plaintiff in error made these contentions by the submission, under the rules of practice of Tennessee, of requests for instructions embodying the contentions, but the Judge refused to sustain any of said contentions, or give any of the requests for instructions embodying them, giving as his reason for his refusal that the proof showed that

the sale made by the plaintiff in error was not an interstate transaction, but a transaction between citizens of the same State.

Upon an appeal of this case from the Circuit Court of Monroe County, Tennessee, to the Supreme Court of Tennessee, plaintiff in error made the same contentions, but the Supreme Court of Tennessee affirmed the judgment of the Circuit Court of Monroe County, giving as its reasons for said affirmance its opinion that cigarettes are not "legitimate articles of commerce," and that the package shown to have been sold in this case was not an original package in the "true commercial sense."

ARGUMENT IN SUPPORT OF CONTENTIONS OF PLAINTIFF IN ERROR.

Before entering into a discussion of what would ordinarily be considered the questions involved in this case, it is well to dispose of a question that but for the opinion delivered by the Supreme Court of Tennessee it would never have been considered necessary to discuss; that is, whether cigarettes are articles of commerce. The interpolation of the word "*legitimate*," in the opinion of the Supreme Court of Tennessee, may have significance or it may not. If it means simply "legal," it has no significance at all; for in a discussion by or before a Court the phrase "article of commerce" means an article *legally* recognizable as a commercial article. But the word "legitimate," as used by the Supreme Court of Tennessee, seems to carry with it a sort of moral meaning, as it were, and the Court's discussion of the noxiousness and injurious qualities of the cigarette would seem to indicate that its use of the word "legitimate" is

somewhat after the idea involved in the use of that word by parties who discuss whether liquor selling or money lending is a "legitimate" vocation.

A quotation from the opinion of that Court justifies this doubt as to its meaning in the use of the word "legitimate."

> "Are cigarettes *legitimate* articles of commerce? We think they are not, because wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether.
>
> Beyond question, their every tendency is toward the impairment of physical health and mental vigor.
>
> There is no proof in the record as to the character of cigarettes, yet their character is so well and so generally known to be that stated above that the courts are authorized to take judicial cognizance of the fact.
>
> No particular proof is required in regard to those facts, which, by human observation and experience, have become well and generally known to be true (Schollenberger *v.* Pennsylvania, 171 U. S., 1. 1 Greenl. Evi., Sec. 6; Whart. Evi., 282; 1 Jones Evi., Secs. 129 and 134; Lanfear *v.* Masters, 18 La. An., 497; S. C., 99 Am. Dec., 658 and note 693; State *v.* Goyotte, 11 R. I., 592; Watson *v.* State, 55 Ala., 158); nor is it essential that they shall have been formally recorded in written history or science to entitle courts to take judicial notice of

them (Boullemet *v.* State, 28 Ala., 83; 12 Am. and Eng. Ency. of Law, 199).

It is a part of the history of the organization of the volunteer army in the United States during the present year that large numbers of men, otherwise capable, had rendered themselves unfit for service by the use of cigarettes, and that among the applicants who were addicted to the use of cigarettes, more were rejected by examining physicians on account of disabilities thus caused than for any other, and perhaps every other, reason.

It is also a part of the unwritten history of the legislation in question that it was based upon, and brought to passage by, the firm conviction in the minds of legislators and of the public that cigarettes are wholly noxious and deleterious. The enactment was made upon this idea, and alone, for the protection of the people of the State from an unmitigated evil.

Such being the nature of cigarettes, they cannot be *legitimate* articles of commerce; and consequently, are not within the provisions of the Federal Constitution (Art. 1, Sec. 8, Cl. 3) in relation to the regulation by Congress of commerce with foreign nations and among the several States and with the Indian tribes."

If this second suggested meaning of "legitimate" is its significane as used by the Supreme Court of Tennessee, its interpolation is unjustified. Whether or not an article is or is not an article of commerce is dependent, not on the question of its noxiousness or beneficence; it is not a question of opinion at all, it is a question of fact. Any article that men buy and sell is legally an article of

commerce, and as such, when commerce in it is interstate, and that commerce is to be regulated by Congress alone.

This contention does not deny the right of a State to protect its citizens against involuntary injury, or fraudulent sales. High explosives, or malodorous guanos, are articles of commerce, but their introduction into a State may endanger the lives and comfort of the citizens, and the State may therefore regulate, or perhaps prohibit, their coming. Putrid meat is an article of commerce; it is bought and sold as a fertilizer, or material for soap, but it is not fit to be eaten, and the State may, by inspection laws, provide against the fraud that might be practiced on its citizens by an offer to sell putrid meat as food. This right of the State, though, to pass inspection and quarantine laws, does not alter the fact that so far as being an article of commerce is concerned, any article that *A* has in his possession and wants to sell, and *B* wants to buy, is an article of commerce. We submit that expressions in some of the cases which refer to various articles, such as clothing from an infected district, as not being articles of commerce, have been made loosely, and the Courts that made use of such expressions meant by them only that articles such as those referred to, articles which by their very presence or transit endanger the lives or comfort of citizens, have no commercial rights superior to the police power of the State or municipality. This is unquestionably true, and it is upon this that State quarantine laws can be upheld.

It has been suggested, too, inferentially rather than directly, that the novelty of an article might preclude its right to be considererd an article of commerce. This suggestion cannot be material in this case, for cigarettes

are not novel; but the suggestion itself, it is respectfully suggested, is wholly unsound. The day after the typewriter was invented, and the day its manufacturer first wanted to sell and transport one of the new machines, the typewriter became an article of commerce. If its mere novelty, without other objectionable features, were to rob an article of its claim for commercial recognition, there might be a stopping of enterprise and progress.

The cigarette, however, is exempt from either of the objections referred to. Its transit through a State, or its stopping within a State, brings no danger nor discomfort to any citizen. It will not explode, it is not mal-odorous.

Neither is the cigarette a novel product and only heard of yesterday. It has been known to and taxed by Congress in the following enactments: June 30th, 1864; March 3d, 1865; July 13th, 1866; March 2d, 1867; July 20th, 1868; March 3d, 1875; March 3d, 1883; July 24th, 1897; and the War Revenue Act of 1898. It has been known in literature, certainly since 1845, when Joseph Baker, in a book published in London, had this to say in its favor: "The cigarette has but little strength, it can do you no harm." Its general manufacture and use in this country ante-dates the memory of most men, and in some other countries its beginnings are still further in the past.

The only test as to whether or not an article is a commercial article in which a right of traffic exists that has ever been before suggested by a Court, is whether it is recognized by the *commercial world*, the *laws of Congress* and the *decisions of the courts* as such. As said by this Court in one of its famous cases:

"Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of Inter-State Commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations while they retain that character; although at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them." . . . "That ardent spirits, etc., distilled liquors, ale and beer are subjects of exchange, barter and traffic like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of the courts, it is not denied. Being thus articles of commerce, can a State, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State?" (Leisy *v.* Hardin, 135, U. S., 100.)

Cigarettes are commercial articles recognized (1) by the *comercial world*, (2) the *laws of Congress*, and the (3) *decisions of courts.*

(1). The commercial world certainly recognizes cigarettes as commercial articles. The very statute, for the violation of which plaintiff in error is indicted, shows that they are so recognized, for it makes it a misdemeanor, not only for persons, but for any *firm or corporation*, to sell cigarettes, and it makes it a misdemeanor also, for any person, firm or corporation to *bring them into the State* for the purpose of selling. The report of

the Commissioners of Internal Revenue for 1897 shows that during that year there were imported from foreign countries 4,312,360 cigarettes, and their annual output in this country, to say nothing of cigarette papers, will reach 4,000,000,000. There are large factories devoted to the manufacture, large warehouses devoted to the storage, and large stores devoted to the sale of cigarettes. They are, and have been for years, on the price-lists of wholesale tobacconists, and wholesale grocers. Whatever our opinion as to the benefit or harm that comes from their use, cigarettes are certainly known to, and recognized by, the commercial world.

(2). The laws of Congress recognize the commercial quality of cigarettes.

In the case of Schollenberger *v.* Pennsylvania, (171 U. S., 1,) oleomargarine was the subject of discussion, and oleomargarine has been recognized by Congress by just one single enactment, and yet the Court says, in discussing that commodity and that enactment:

> "Any legislation of Congress upon the subject must, of course, be regarded by this Court as a fact of first importance. If Congress has affirmatively pronounced the article to be a proper subject of commerce, we shall rightly be influenced by that declaration."

As shown above, Congressional legislation, in recognition of cigarettes as proper subjects of taxation, and therefore of traffic and trade, began June 30th, 1864, and by frequent enactments since, they have been recognized not only as proper subjects of taxation, but as subjects of tariff regulation as well. Now, it is not meant that the fact that taxes are paid on the manufacture or sale

of an article is tantamount to a declaration by Congress that no State shall interfere in the sale or manufacture of that article. The fact is that Congress has, by a general statute (Rev. Stat., Sec. 3243), declared that such shall not be the effect of the levying of an Internal Revenue tax. But the levying of an Internal Revenue tax is a distinct recognition of an article as a commercial article, for it would be monstrous to assume that the United States would tax and license the manufacture and sale of an article that was not and nowhere an article of commerce. And it is not only by the levy of an Internal Revenue tax that Congress has recognized cigarettes, but it has also made express regulations for their exportation and importation (Secs. 3385, 3387, 3396 and 3392, Revs'd Stats.). So far as Congress has ever recognized any article as an article of commerce, it has recognized cigarettes. It has provided for a tax upon their manufacture; it has provided regulations for their manufacture and sale; it has provided for their importation and exportation; and further than this, Congress has never gone in the recognition of any article. Plaintiff in error confidently contends, therefore, that this authorizes him to say that the cigarette has been affirmatively pronounced to be a proper subject of commerce by Congressional enactment.

(3). Not only, though, have cigarettes been recognized by the usages of commerce and the Acts of Congress, as commercial articles, but the decisions of the Courts are to the same effect: The first adjudication on the subject was in June, 1893, by U. S. Circuit Judge Hanford, in the unreported case of Washington *v.* Coovert. The case was appealed to the Supreme Court of the United States, but the appeal was dismissed on a

point of practice (164 U. S., 702). The State was the appellant, and the judgment of Judge Hanford was as follows:

> "Ordered, adjudged and decreed that the said law of the State of Washington, prohibiting the sale of cigarettes, referred to in the petition, is in contravention of Article 1, of Section 8, of the Constitution of the United States, and null and void, in so far as it prohibits, or attempts to prohibit, the selling, giving or furnishing to any one by the importer of a slide pasteboard box containing ten paper-wrapped cigarettes, said box having upon it the U. S. Internal Revenue stamp and caution notice required by law, also the number of manufacturer's district and State, which box was received by the importer from without the State of Washington, enclosed with other similar boxes in a common pine shipping case, and that the said M. L. Coovert to be by said George Nerton, Sheriff of Clark County, forthwith discharged from imprisonment and detention for the cause in said petition aforesaid."

In 1895, *In re* Minor was heard before Circuit Judge Goff (69 Fed. Rep., 233), and the Court in that case said, in part:

> "This act of the West Virginia Legislature inhibits the sale by the petitioner (unless he first pays a tax for the privilege to do so) of the original package of cigarettes, imported by him into the State of West Virginia from the State of New York, *while they are still articles of commerce*, and by the authorities I have referred to, that is not a proper subject of police power. * * * I

reach the conclusion that said section (the act under consideration) *so far as it applies to cigarettes* imported from another State into the State of West Virginia, and sold by the importer in the last named State, in the original packages, *is a burden upon commerce among the States, and to that extent in violation of the commercial clause of the Constitution of the United States.*"

In 1896, the Legislature of the State of Iowa passed a statute prohibiting the sale of cigarettes, and the validity of the statute was contested before Judge Sanborn, Judge of the United States Circuit Court. His judgment is reported in 76 Fed. Rep., 956, as follows:

> "The Iowa statute of July 4, 1896, prohibiting the manufacture or sale of cigarettes, etc., within the State, is void, as being an unwarrantable interference with interstate commerce, in so far as it applies to the sale of cigarettes imported into the State and sold in the original packages of importation; such packages being the usual pasteboard box, containing 10 cigarettes each, bearing the proper Internal Revenue stamp, and not inclosed in any other packages or wrappers."

Upon an amendment and re-enactment of the statutes of West Virginia, passed upon in Minor's case, the Supreme Court of Appeals of West Virginia delivered an opinion in exact accord with the opinion of Circuit Judge Goff, and cigarettes were held to be articles of commerce, and as such, entitled to all of the protections of the commerce clause of the Federal Constitution (State *v.* Goetze, 27 S. E. Rep., 225).

In September, 1897 the very statute that is involved in this case, to wit: the Statute of the State of Tennes-

see, was before Circuit Judge Lurton, and he, after quoting that part of the opinion in Leisy *v.* Hardin, which holds spirituous liquors to be articles of commerce, continues (Sawrie *v.* Tennessee, 82 Fed. Rep., 615):

> "So, in this case it must be recognized that the *cigarette is equally a well-known subject of barter, sale, trade and commerce,—so recognized in all the channels of commerce, and by the laws of Congress, which prescribe the original package for the purpose of taxation.* The question here, as in this Whiskey case, just cited, is: Whether, being an article of commerce, can the State of Tennessee, in the absence of legislation by Congress, prohibit their importation from a sister State? Or, when imported, prohibit their sale by the importer? No important distinction can be drawn between this case and *Leisy* v. *Hardin.* If all that can be said touching the evil consequences of the use of the cigarette upon the health and morals of the State can be admitted, much more can be said, and was said, of the evils sought to be guarded against by the Iowa prohibition statute. If the traffic in ardent spirits is a recognized and legitimate subject of commerce, so is the traffic in the cigarette. If Congress has recognized the fact that the one is an article of traffic and commerce, by prescribing an original package and imposing a tax thereon, so it has recognized the other."

And yet Judge Lurton was not free from the prejudice that exists in some quarters against the use of cig-

arettes, for he concludes his opinion against the validity of the statute, with this sentence:

> "I reach this conclusion without any hesitation, though reluctant to even partially strike down a statute aimed at the suppression of an evil of most pronounced character."

The Supreme Court of Iowa, which Court is also not very friendly to cigarettes, had the question of the validity of a statute prohibiting the sale of cigarettes before it in January, 1898, and Chief Justice Deemer, delivering the opinion of the courts, says (McGregor *v.* Cone, 39 L. R. A., 484):

> "It seems to be well settled by the later decisions of the United States courts that, while the States have the undoubted right to control their purely internal affairs, yet whenever the law enacted in the exercise of this power amounts to a regulation of commerce among the States, as it does when it directly or indirectly inhibits the receipt of an imported commodity, or its disposition, before it has ceased to become an article of trade between one State and another, it comes in conflict with a power which has been invested in the general Government, and is therefore void. That the use of the article is deleterious to the inhabitants of the State is not regarded as material, so long as it is recognized by the commercial world, by the laws of Congress, and by the decisions of the courts, as a commodity in which a right of traffic exists. (Citing Brown *v.* Maryland, Leisy *v.* Hardin, *In re* Rahrer, and Bowman *v.* Railroad.) ***That cigarettes are a recognized commercial commodity must be conceded***, and it

follows that, in so far as the law in question amounts to a regulation of commerce, it is unconstitutional and void."

Four able and distinguished Circuit Court Judges of the United States and two of the State courts of highest appellate jurisdiction have held cigarettes to be "legitimate" articles of commerce. On the other hand, unsustained by any precedent, and without any testimony as to the character of cigarettes, the Supreme Court of Tennessee stands solitary and alone.

What is a cigarette anyway? The Encyclopædia Brittannica, Vol. 5, page 76, describes it as follows:

> "Cigarettes are small cigars, sometimes consisting of fine-cut tobacco wrapped up in thin paper or inserted in straw tubes."

Congress, in the Act of July 24th, 1897, gives the following definition:

> "That all rolls of tobacco, or any substitute therefor, wrapped with tobacco, shall be classed as cigars; and all rolls of tobacco, or any substitute therefor, wrapped in paper or any substance other than tobacco shall be classed as cigarettes."

Webster defines a cigarette to be:

> "A little fine tobacco rolled in paper for smoking."

That is all that a cigarette is, and it is this combination of tobacco and paper that the Supreme Court of Tennessee has declared is not an article of commerce at all. So far as tobacco is concerned, it has been judicially considered, and the New York Court of Appeals,

speaking of it in the form of cigars, says (*In re* Jacob, 98 N. Y., 98):

> "We must take judicial notice of the nature and qualities of tobacco. It has been in general use among civilized men for more than two centuries. It is used in some form by a majority of the men in this State, by the good and the bad, learned and unlearned, the rich and the poor. Its manufacture into cigars is permitted without any hindrance, except for revenue purposes, in all civilized lands. It has never been said, so far as we can learn, and it was not affirmed, even on the argument before us, that its preparation and manufacture into cigars were dangerous to the public health. We are not aware, and are not able to learn, that tobacco is even injurious to the health of those who deal in it, or are engaged in its production or manufacture. * * Mr. Secretary McCulloch, in his late annual report to Congress, in which he recommends the removal of the internal tax from tobacco that it might thus be placed upon a footing with other agricultural products, says: 'An article which is so generally used and which adds so much to the comforts of the large numbers of our population who earn their living by manual labor, cannot properly be considered a luxury.'"

It is this article that is denounced as unworthy of commercial recognition. It is not this article adulterated, for there is no evidence that the package sold by plaintiff in error contained the slightest adulterant, and the statute upheld is not an inspection law, but an absolute prohibition. If this law is to be upheld on the

ground that is taken by the Supreme Court of Tennessee, then a law prohibiting the importation or sale of tobacco in any form could be upheld; or the sale of coffee, if the members of the Legislature and Court should happen to be opposed to the use of coffee; or the sale of flesh of any kind, if the Legislature and Court happened to be composed of vegetarians.

It is to be noticed that the finding by the Supreme Court of Tennessee that cigarettes are not commercial articles, is not based upon testimony of their noxious qualities, nor on any other testimony; it is based on the fact that the Legislature has prohibited their sale, and the fact that the Court believes them to be noxious. Plaintiff in error by no means concedes that direct testimony of their noxious qualities would justify any court in declaring them to be not articles of commerce; indeed, he contends, as hereinbefore, and as has been frequently held by this Court and other courts, that the conceded noxious qualities of an article has nothing to do with its character as a commercial article. But he does desire to call attention to the fact that in this case the Court did not have before it any evidence whatever of the qualities of the cigarettes. The Court saw fit to take judicial notice of what it calls the well-known fact of the noxious qualities of cigarettes, when the consensus of opinion of those that know is that the cigarette, as sold upon the market, is not injurious in any other way than tobacco in other form.

The truth is that the prejudice against cigarettes in this country has, as its real reason, a feeling such as is expressed in "The Reference Hand Book of Medical Science" (Albert H. Buck, 1889):

> "Cigarettes are, on the whole, the most injurious form of tobacco, *not*, however, *because they are at all harmful if smoked in moderation*, but because *they are particularly affected by the youth of this country.*"

That is to say, the writer condemns nicotine gluttons and disapproves of the use of tobacco by the young. And to tobacco might be added, as perhaps equally objectionable, tea or coffee.

Perhaps there is no higher authority than Prof. H. H. Wiley, Chief Chemist of the United States Department of Agriculture, and he defines the cigarette that is to be found on the market to be 1.0926 grams of tobacco enveloped in a wrapper which weighs .038 grams. That is, one pound of tobacco will furnish the fillers for about 416 cigarettes, and one pound of cigarette paper will serve to envelope 1200 cigarette fillers. The same authority declares that "the samples purchased in the open market were found to be entirely free from any trace of arsenic, or of opium, or of any of its active principles." To the same effect is Prof. Willis G. Tucker, Analysist to the New York State Board of Health; Dr. G. F. Payne, State Chemist of Georgia; Wm. Odling, Prof. of Chemistry, University of Oxford, England, and a great number of other recognized authorities in the scientific world. Indeed, plaintiff in error believes that he can safely hazard his case on the statement that cigarettes, as popularly sold on the market, have never been found by any capable chemist to contain any noxious substance other than is contained in all forms of tobacco. He presumes that the Supreme Court of Tennessee would say that the fact that the tobacco for cigarettes contain opium, and that the papers are whitened by arsenic, are

so well known as to justify the Court in taking judicial notice of them, for these are the things that some people believe; whereas, as a matter of fact, the entire absence of either of these substances is thoroughly well known to every chemist who has made examination, including those of highest official positions in the United States.

In brief recapitulation of what has been argued at perhaps too great length, plaintiff in error contends that if you admit that cigarettes are noxious, you would not destroy their quality as commercial articles; that evidence of their noxiousness would be irrelevant, for they are recognized as commercial articles by commercial usage, by Congress and by the decisions of the courts; that however harmful they may be, they do not harm in their transit nor in their being stored, but their harm can come only, as harm comes from liquor, by an injudicious or intemperate use; that the so-called fact which the Supreme Court of Tennessee says is so well known as not to require evidence, to wit, the superlatively noxious quality of cigarettes, is in truth not a fact at all, and that cigarettes constitute the least harmful form of tobacco.

Cigarettes, then, are articles recognized as articles of commerce, by the commercial world for an indefinite time, by the law of Congress since 1864, and by the decisions of the courts since they were first brought into court. The sale of these articles is prohibited by a statute which applies equally to the domestic product and to imports. The legislation, it may be admitted, is based on the belief of the Legislature that the use of the article by the citizens of the State is harmful either to the citizens themselves or to the State. Can such a law be upheld when it seeks to prohibit the sale of the imported

articles? Is the belief of the Legislature that the article is harmful, even when that belief is supported by the concurring opinion of the Supreme Court of the State, sufficient to make valid the law so far as it seeks to prohibit the sale of such imports?

This question of the validity of a State prohibitory statute, as applied to the sale of imports from another State, came very prominently and famously before this Court in 1846, in the "License Cases" (5 Howard, 504). These cases were so important and interesting that all of the Justices delivered opinions. The Justices delivering the opinions differed from each other in their views as to the respective rights of Congress and the States under the commerce clause of the Constitution; some of the Justices contending that so far as the determination of the question as to what should be an article of commerce within it, the State was supreme, even though Congress had affirmatively spoken, and Justice McLean, in the course of his opinion, set out that doctrine as follows:

> "If a foreign spirit should be imported containing deleterious ingredients, fatal to the health of those who use it, its sale may be prohibited. When, in the appropriate exercise of these Federal and State powers, contingently and incidentally their lines of action may run into each other, if the State power be necessary to the preservation of the morals, the health, or the safety of the community, it must be maintained."

This view was earnestly combatted by Justice Catron in language that has perhaps not since been improved upon:

> "If this be the true construction of the constitutional provision, the paramount power of Con-

gress to regulate commerce is subject to a very material limitation; for it takes from Congress and leaves with the States the power to determine the commodities or articles of property which are the subjects of lawful commerce. Congress may regulate, but the States determine, what shall or shall not be regulated. Upon this theory the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the State police power; for it is obvious that the power to determine the articles which may be subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power must not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning adopted by the State and its courts could bring within the police power any article of consumption that a State might wish to exclude, whether it belonged to that which was drank, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher grounds than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing. * * * For these reasons, I think the case cannot depend on the reserve power in the State to regulate its own police."

The opinion of Judge Catron, however, was that the power of Congress to regulate commerce is not exclusive, and that until it has spoken, the States may speak as to what shall be the articles of commerce, just as they may speak with reference to purely local commercial regulations, such as harbor improvement, etc. It is with this opinion that a majority of the Court concurred, and it is upon this theory that in the "License Cases" the right of the State to prohibit or license, even when applied to sales of imports, was affirmed.

The first notable criticism that the "License Cases" received in the Supreme Court of the United States, and the first time their authority was recognized as tottering, was in 1888, when Bowman *v.* Railroad was decided (125 U. S., 465). The question presented in that case was the validity of an Iowa statute making it a misdemeanor for any common carrier to transport or convey from one point to another within the State of Iowa any intoxicating liquors without conforming to certain State regulations. Justice Matthews, delivering the opinion of the Court in that case, is as strong and earnest in combatting the theory that the silence of Congress means its intention to submit to the several States the decision of what shall and what shall not be articles of commerce, as Judge Catron, in the earlier case, in combating the theory that the right of Congress was subordinate to the rights of the several States:

> "It (the State) cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be. The statute of Iowa, under consideration, falls within this

prohibition. It is not an inspection law; it is not a quarantine or sanitary law. It is essentially a regulation of commerce among the States within any definition heretofore given to that term, or which can be given; and although its motive and purpose are to perfect the policy of the State of Iowa in protecting its citizens against the evils of intemperance, it is none the less on that account a regulation of commerce. If it had extended its provisions so as to prohibit its introduction into the State from foreign countries of all importations of intoxicating liquor produced abroad, no one would doubt the nature of the provision as a regulation of foreign commerce. Its nature is not changed by its application to commerce among the States. Can it be supposed that by omitting any express declarations on the subject Congress has intended to submit to the several States the decision of the question in each locality of what shall and what shall not be articles of traffic in the interstate commerce of the country? If so, it has left to each State, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured or sold in any State and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious; It may not choose, even, to be governed by considerations growing out of the health, comfort or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the

promotion and benefit of its own agriculture, manufactures or arts of any description, and prevent the introduction and sale within the limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several States of the Union, it cannot be supposed that the Constitution or Congress have intended to limit the freedom of commercial intercourse among the people of the several States."

We do not mean that Bowman *v.* Railroad was the first case decided after 1846 that was at all inconsistent with the "License Cases," for, as will be seen in the opinion in Bowman's case, there had been in the interim many cases decided by the Supreme Court of the United States that were, on principle, not in harmony with the "License Cases." But Bowman's case was the first in which a decided and striking dissent was entered to the theories announced in the "License Cases." It is true that Bowman's case differed from the "License Cases" in that a *sale* was under discussion in the "License Cases" and a *transportation* was the thing discussed in Bowman's case; but it was seen that the reasoning of Bowman's case would mean the absolute overturning of the doctrine held in the "License Cases." And so it was as soon as the Supreme Court reached the question.

In 1890 the case of Leisy *v.* Hardin (135 U. S., 100) was decided by this Court. A statute of Iowa forbade

the selling of intoxicating liquors by any one, and provided for the forfeiture of all liquor kept with intent to sell. Under this statute the Marshal of the City of Keokuk, Iowa, seized one hundred and twenty-two one-quarter barrels of beer, one hundred and seventy-one one-eighth barrels of beer and eleven sealed cases of beer, under a proceeding instituted in accordance with the statute of Iowa. The beer had been imported from Illinois by the Leisys with the purpose of selling the same within the State of Iowa. The question was whether the statute, intended only to prevent the sale within the State of an article believed by the State Legislature to be injurious, could be enforced in so far as it sought to prohibit the keeping for sale or selling of the imported article. The Court's Chief Justice, Fuller, delivering the opinion, declared the statute invalid. This opinion is so well known as to relieve plaintiff in error of the necessity of making quotations therefrom, but it is perhaps well to say that in this case this Court returned to the ancient doctrine first announced in Brown *v.* Maryland (12 Wheat., 419), that the right to sell an article imported is an inseparable incident to the right to import it:

> "The authority of Pierce *v.* New Hampshire, in so far as it rests on the view that the law of New Hampshire was valid, because Congress has made no regulation on the subject, must be regarded as having been distinctly overthrown by the numerous cases hereinafter referred to."
>
> "Under our decision in Bowman *v.* Chicago and N. W. R. Co., *supra*, they had the right to import this beer into that State, and in the view which we have expressed they had the right to

sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time we hold that, in the absence of Congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the oreign non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any article which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without Congressional permission, is to concede to a majority of the people of a State, represented in the State Legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create."

The case of Leisy *v.* Hardin was decided in 1890, and from that time to this its authority has not been questioned, so far as plaintiff in error can ascertain, by any

Court. It has been referred to as controlling in innumerable cases in State Courts and United States Circuit and District Courts. It has been cited with approval in every case involving questions of interstate commerce decided by the Supreme Court of the United States since its decision. Congress promptly recognized its authority by the passage of the Wilson Bill (Act of Congress of August 8th, 1890, 26 Stat., 313), which provided that intoxicating liquors, upon their coming into a State, should be subject to the operation of the laws of such State enacted in the exercise of its police power. The case of Leisy *v.* Hardin has not been overruled nor modified by this Court, and since its decision the doctrines it enunciated have been considered as settled law. These doctrines have perhaps nowhere been more concisely stated than by Justice White in Vance *v.* Vandercook (170 U. S., 438), in what may be called, as he calls them, the "few elementary propositions which are so entirely concluded by the previous adjudications of this Court that they need only to be briefly recapitulated" ——— the "A B C's" of the law on the subject. While these propositions refer to liquor, they are applicable also to cigarettes, for, as is said by Circuit Judge Lurton, Sawrie *v.* Tennessee, *supra:*

> "If all that can be said touching the evil consequences of the use of the cigarette upon the health and morals of the State be admitted, much more can be said, and was said, of the evils (of intoxicating liquors) sought to be guarded against by the Iowa prohibition statute."

These "elementary propositions" are as follows:

> "(*a*). Beyond dispute, the respective States have plenary power to regulate the sale of intoxicating

liquors within their borders, and the scope and extent of such regulations depend solely on the judgment of the law-making power of the States, provided, always, they do not transcend the limits of State authority by invading rights which are secured by the Constitution of the United States; and provided further, that the regulations, as adopted, do not operate a discrimination against the rights of residents or citizens of other States of the Union.

(*b*). Equally well established is the proposition that the right to send liquors from one State into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and hence, that a State law, which denies such a right, or substantially interferes or hampers the same, is in conflict with the Constitution of the United States.

(*c*). It is also certain that the settled doctrine is that the power to ship merchandise from one State into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any State regulation to the contrary nothwithstanding—that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution until, by a sale in the original package, they have commingled with the general mass of property in the State."

Neither Plumley's case (155 U. S., 461) nor Schollenberger's case (171 U. S., 1), referred to in the opinion of

the Supreme Court of Tennessee, is out of harmony with the views announced in Leisy *v.* Hardin, *supra*, and re-announced in Vance *v.* Vandercook, *supra*. Plumley's case was where a State statute was sustained as being an inspection law. It was not a prohibition law at all, and the title of the statute was "An Act to Prevent Deception in the Manufacture and Sale of Imitation Butter." There is no discussion in that case of what is or is not an article of commerce, but the whole ground for the opinion of the Court is contained in the words of Justice Harlan, as follows:

> "If any one thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty, under the Statute of Massachusetts, to manufacture it in that State or to sell it there in such a manner as to inform the customer of its real character. He is only forbidden to practice, in such matters, a fraud upon the general public. The statute seeks to suppress false pretences and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different than that which is offered for sale. Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?"

One would not suppose that Schollenberger's case (171 U. S., 1) would have been cited as sustaining the opinion of the Supreme Court of Tennessee in the case at bar, but it is. That was a case that arose under a Pennsylvania statute intended to prevent the sale of oleomargarine within the State of Pennsylvania. There were shipped to Schollenberger, from the State of Rhode Island, unenclosed packages of oleomargarine, suitable for the retail trade. He sold one of these packages, and the question arose whether the prohibition statute was valid as applied to this sale.

The Supreme Court of the United States decided that it was not. The Court further decided that oleomargarine is an article of commerce, and, in justification of that holding, referred to the very circumstances that are relied on in this argument to justify the contention that cigarettes are articles of commerce, to wit: that it had been known and manufactured for a long time; that its manufacture had been regulated and taxed by Congressional enactment, and that it is recognized as a commercial article by the commercial usage of the world. It was argued in that case, in favor of the validity of the law, that adulteration of oleomargarine was very easy and the detection of the adulteration was so difficult as to make an inspection law impracticable, and that most, if not all, of the oleomargarine of commerce is adulterated. While this is not said by the Supreme Court of Tennessee, with reference to cigarettes, the Supreme Court of Tennessee must believe this of them, or must believe that paper and tobacco are much more horrible things than they are usually believed to be. But this liability to adulteration and impracticability of the detection of adulteration were not thought by the Supreme Court of the United States, in Schollenberger's case,

sufficient to validate or justify a prohibition law. Two quotations from the opinion in Schollenberger's case will serve to show how far it is from an authority that sustains the decision of the Supreme Court of Tennessee in the case at bar:

> "In the execution of its police powers we admit the right of the State to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity, and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the State. But, in carrying out its purposes, the State cannot absolutely prohibit the introduction within the State of an article of commerce like pure oleomargarine. * * * The fact that it may be adulterated does not afford a foundation to absolutely prohibit its introduction into the State. Although the adulterated articles may possibly, in some cases, be injurious to the health of the public, yet that does not furnish a justification for an absolute prohibition. A law which does thus prohibit the introduction of an article like oleomargarine within the State is not a law which regulates or restricts the sale of articles deemed injurious to the health of the community, but is one which prevents the introduction of a perfectly healthful commodity merely for the purpose of in that way more easily preventing an adulterated and possibly injurious article from being introduced. We do not think this is a fair exercise of legislative discretion when applied to the article in question."

"What are the rights of one engaged in interstate commerce in regard to the introduction of a lawful article of commerce into a State? Those rights have been declared by various decisions of this Court, some of them made at a very early date and coming down to the present time.

In the leading case of Gibbons *v.* Ogden (9 Wheat. 1, at page 193) it was said by Marshall, Chief Justice, that the commerce clause extends to every species of commercial intercourse among the several States, and that it does not stop at the external boundary of a State, and that this power to regulate included the power to prescribe the rule by which commerce is to be governed, and it was held that navigation was included within that power.

In Brown *v.* State of Maryland (12 Wheat., 419) it was stated that this power to regulate commerce could not be stopped at the external boundary of a State, but must enter its interior, and that if the power reached the interior of the State and might be there exercised, it must be capable of authorizing the sale of those articles which it introduces. It was said that 'sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce.'

Years after the decision of the last case, and after many other decisions had been made upon the general subject of the commerce clause, this

Court, in Bowman *v.* Chicago and Northwestern Railway Company (125 U. S., 465), held that the State could not, *for the purpose of protecting its people against the evils of intemperance*, pass an act which regulated commerce by forbidding any common carrier to bring intoxicating liquors into the State from another State or Territory, excepting on conditions mentioned in the act. Such act was held to be repugnant to the Constitution of the United States, as affecting interstate commerce in an essential and vital part. But whether the right to transport an article of commerce from one State to another included, by necessary implication, the right of the consignee to sell it in unbroken packages at the place where the transportation terminated was not decided. In Brown *v.* Maryland (*supra*) it was said that the right of transportation did include the right to sell, as to foreign commerce, and, in the course of his opinion, Chief Justice Marshall said that the conclusion would be the same in the case of commerce among the States; but, as it was not necessary to express any opinion upon the point, it was simply held, in the Bowman case, that the power to regulate or forbid the sale of a commodity, after it had been brought into a State, does not carry with it the right and power to prevent its introduction by transportation from another State.

The case of Leisy *v.* Hardin (135 U. S., 100) went a step further than the Bowman case, and held that the importer had the right to sell in a State into which he brought the article from another State in the original packages or kegs, unbroken and unopened, notwithstanding a statute

of the State prohibiting the sale of such articles except for the purposes therein named and under a license from the State. Such a statute was held to be unconstitutional, as repugnant to the clause of the Constitution granting power to Congress to regulate commerce with foreign nations and among the several States. Mr. Chief Justice Fuller, in speaking for the Court, said: 'Under our decision in Bowman *v.* Chicago, etc., R. R. Co. (*supra*) they had the right to import this beer into that State, and, in the view which we have expressed, they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that, in the absence of Congressional permission to do so, the State had no power to interfere, by seizure or any other action, in prohibition of importation and sale by the foreign or non-resident importer.' The right of the State to prohibit the sale in the original package was denied, in the absence of any law of Congress upon the subject permitting the State to prohibit such sale. There is no such law of Congress relating to articles like oleomargarine. Such articles are, therefore, in like condition as were the liquors in the cases above cited.

Subsequent to the decision in the *Leisy case*, and on the 8th of August, 1890 (26 Stat., 313), Congress passed an act commonly known as the Wilson act, which provided that, upon the arrival in any State or Territory of the intoxicating liquors transported therein, they should be subject to the operation and effect of the laws of the State or Territory enacted in the exercise of its

police power, to the same extent and in the same manner as though such liquors had been produced in such State or Territory, and that they should not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This was held to be a valid and constitutional exercise of the power conferred upon Congress (*in re* Rahrer, Petitioner, 140 U. S., 545). In the absence of Congressional legislation, therefore, the right to import a lawful article of commerce from one State to another *continues until a sale in the original package* in which the article was introduced into the State.

The case of Emert *v.* Missouri (156 U. S., 296) involved the validity of a statute of Missouri providing that peddlers of goods, going from place to place within the State to sell them, should take out and pay for licenses. The statute was held not to violate the commerce clause of the Constitution of the United States, because it made no discrimination between residents or products of the State and those of other States. The conviction of the plaintiff in error for a violation of the statute was upheld, although he was an agent of a corporation which manufactured the property in another State and sent it to him to sell as its agent. It was held to be within the police power of the State to regulate the occupation of *itinerant peddlers*, and to compel them to obtain licenses to practice their trade, and such power had been exerted from the earliest times. The remark of Chief Justice Marshall, in Brown *v.* Maryland (*supra*), was quoted, that "the right of sale may very well be annexed to importation without an-

> nexing to it also the privilege of using the officers licensed by the State to make sales in a peculiar way" (page 313). It was the privilege of selling in a peculiar way, *as a peddler*, which was licensed in the Emert case, and such a person, it was therein decided, could properly be made to pay a license for selling in that way an article manufactured in another State and sent into Missouri, as well as for selling, in the same way, articles manufactured in Missouri, so long as there was no discrimination between the two classes of goods.
>
> The Emert case does not overrule or affect the cases above cited as to the right to sell."

Collins *v.* New Hampshire is another case cited in the opinion of the Supreme Court of Tennessee as if it sustained conclusions arrived at by that Court in that opinion. Collins *v.* New Hampshire (171 U. S., 30,) was decided by the Supreme Court of the United States, Justice Peckham delivering the opinion of the Court, on the same day that Schollenberger's case was decided, May 23, 1898. It involved the validity, as applied to imports from another State, of a statute of New Hampshire requiring oleomargarine to be of a pink color and forbidding the sale of oleomargarine not so colored. The Court delivered a short opinion, and the gist of it is contained in the following paragraph:

> "The plaintiff in error claims that the statute under which he was indicted and convicted is void, because in contravention of the Constitution of the United States, which gives power to Congress 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.' We think this case comes within the

> principle of the cases just decided regarding the statute of the Commonwealth of Pennsylvania prohibiting the introduction of oleomargarine into the Commonwealth. This statute is, in its practical effect, prohibitory. It is clear that it is not an inspection law in any sense. It provides for no inspection, and it is apparent that none was intended. The act is a mere evasion of the direct prohibition contained in the Pennsylvania statute, and yet, if enforced, the result, within the State, would be quite as positive in the total suppression of the article, as is the case with the Pennsylvania act."

Plaintiff in error believes that further argument than is contained in the quotations from the very recent opinions of this Court is unnecessary to establish the proposition, so well and so definitely announced in Leisy *v.* Hardin, as it had first been announced in the first great case on the subject (Gibbons *v.* Ogden, 1 Wheat., 1): "This power to regulate—that is, to prescribe the rule by which commerce is to governed, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." Plaintiff in error believes that it is too well settled to be now disturbed, that the silence of Congress with reference to any article is equivalent to a declaration by Congress than commerce in that article shall be free, and he believes that no State, simply because its Legislature believes the use of an article by its citizens to be harmful, can so legislate as to prevent the importation of such article and its sale as an import.

The next question in the case is whether the package of cigarettes sold by plaintiff in error is an import, and so is entitled to immunity from prohibitory State legislation. The Supreme Court of Tennessee expresses this question as follows: "Was the sale shown to have been made in this case a sale of an *original package* in the true commercial sense?"

Plaintiff in error desires to make to this Court three distinct contentions with reference to this branch of the case:

(*a*). That he had a right to sell this package of cigarettes as an import, because it was the original package of importation, the only package delivered by the shipper to the carrier, and the only package delivered by the carrier to the plaintiff in error, the consignee;

(*b*). That even if the package sold by plaintiff in error had been enclosed with other packages of like kind for convenience of shipment, he would have had the right to break the enclosure and sell the package separately, because the package sold by him was a statutory original package, made such by the enactments of Congress.

(c). That even if the package received by him had not been made by Act of Congress a statutory original package, and even if it were not an original package of importation, it was still an indentifiable import, and in the hands of the first importer, before it had been so mixed with the property of the State as to lose its identity as an import, and as such could be sold by the first importer free from the interference of any State prohibitory law.

(A). There may be two grounds upon which the Supreme Court of Tennessee based its conclusion that the sale in this case was not of an original package in the true commercial sense. The two grounds are close to each other: one of them that the package was so small as to be evidently intended for the consumer rather than for the dealer, and the other, that the method of shipment adopted was such as to show that it would not have been adopted but for a desire on the part of the shipper to claim the immunity given to original packages under the commerce clause of the Federal Constitution. Plaintiff in error respectfully, but very earnestly, contends that neither of these grounds has anything whatever to do with the case.

The original package of transportation has perhaps not been better defined than by the Supreme Court of Iowa, in McGregor *v.* Cone (73 N. W. Rep., 1041; 39 L. R. A., 484). Plaintiff in error, in citing the case of McGregor *v.* Cone does not intend to say that he believes that the case was decided right. Indeed, he confidently insists that the case was decided wrong, as will be hereinafter more fully argued, but its definition of an original package seems to him clear. It is as follows:

> "The original package was and is the package as it existed at the time of its importation from one State into the other. * * The importer decides for himself the size of the package which he desires to import, and when he delivers it to the carrier for transportation he gives it the initial step, and from that time until sold in that form, or broken and transformed, it is a subject of interstate commerce."

The only possible criticism that can be made of that definition is that it emphasizes the non-resident shipper, whom it calls the importer, and does not emphasize the the resident consignee, who might, perhaps more properly, be also called the importer. It is the resident consignee whose act is questioned, and it is the package that he orders and receives from without the State that he has the right to sell. Of course, ordinarily, a delivery to the carrier, if it be a common carrier, is a delivery to the consignee and so the criticism becomes, generally speaking, unimportant. In this case, however, it is important, for the Supreme Court of Tennessee holds that the agent of the carrier, in gathering up the packages from the warehouse of the American Tobacco Company, and in putting these packages into a basket, which basket the carrier already had, was acting as *agent for the Tobacco Company*. If this be true, and if the carrier is to be thus considered the agent of the shipper, the American Tobacco Company, then the delivery to the plaintiff in error was not made until the agent of the carrier delivered these packages to plaintiff in error in Monroe County, Tennessee. Having then ordered these packages, with no basket whatever, and having received these packages, with no basket whatever, so far as the plaintiff in error is concerned, and he is the one indicted, each package is an original package, whatever method of shipment the American Tobacco Company may have adopted.

It seems to plaintiff in error that the mere fact, if it is a fact, that the American Tobacco Company had not usually adopted this method of shipment, and probably would not have adopted it but for the passage of this prohibitory statute, can have absolutely nothing to do

with the matter. Whether a package is or is not an original package of importation cannot depend upon the motive that induced the form of the package. As said by Justice Harlan, in his dissenting opinion in Bowman's case: "In this view (that is, the view of the Court) anyone—even a citizen of Iowa—desiring to obtain intoxicating liquors in that State need only to arrange to have them delivered from some point in another State, in packages of varying sizes as may suit customers."

The Supreme Court of Tennessee declares its opinion that this method of shipment was adopted in order to "evade" the prohibition statute of Tennessee, and the word evade has about it a sinister suggestion. Even conceding that the purpose that induced this method of shipment was a purpose to make it impossible for the State prohibitory statute to apply, plaintiff in error does not believe that any criticism of sinister design is justified. The Constitution of the United States, as construed by the highest Court of the United States, guarantees to plaintiff in error the right to import articles from another State and sell them. Under the technical construction that has been adopted by some courts, in order to have this Constitutional right, plaintiff in error was under the necessity, or at least believed he would be safer in so doing, of offering for sale only the identical package received by him. He induced the manufacturer, who had a factory in North Carolina, to agree to deliver him separate, unenclosed packages, such as would suit his custom. In accordance with that agreement these separate, unenclosed packages were delivered to him. The method of shipment was adopted, not to *evade* a law, but in order to get rid of techinicalities that would, perhaps, under a more convenient method

of shipment, have stood in the way of plaintiff in error in his effort to invoke a right guaranteed to him by the Constitution of the United States. It does not seem that one favoring the validity of the law as applied to the sale of an article which is unquestionably an import would speak of an "evasion," when the only way that the law can be upheld, if upheld at all, is by invoking a palpable and artificial technicality, to wit, that although the article in question is certainly an import in fact, it is not legally such, because the express company, instead of putting the import loose in its car, used a basket!

The size of the package, and the fact that it was suitable for retail trade, cannot make it not an "original package in the true commercial sense." The package was the exact package declared an original package in the true commercial sense in McGregor's case (*supra*), Minors' case (*supra*), Sawrie's case (*supra*), and every other cigarette case that has been decided. As recognized by Justice Harlan, when Bowman's case was decided, the party purchasing imports may purchase them "in packages of varying sizes, *as may suit customers*," and as said by Justice Gray, in his dissenting opinion in Leisy *v.* Hardin (*supra*) (on page 159):

> "If the statutes of a State restricting or prohibiting the sale of intoxicating liquors within its territory are held to be inoperative and void as applied to liquors sent or brought from another State, and sold by the importer in what is called 'original packages,' the consequence must be that an inhabitant of any State may, under pretext of interstate commerce, and without license or supervision of any public authority, carry or send into and sell in any and all of the other States of the

> Union intoxicating liquids of whatever description, *in cases or kegs, or even in single bottles or flasks*, despite any legislation of those States on the subject, and although his own State should be the only one which had enacted similar laws."

The Circuit Court of the United States, in the 8th Circuit, in Bein's case (42 Fed. Rep., 545), Circuit Judge Caldwell delivering the opinion, puts the question of the small package very well and clearly.

> "It is not perceived why, in the absence of legislation by Congress to the contrary, the importer may not determine for himself the form and size of the package he puts up for export. The idea that small packages of liquor cannot be treated as original packages because they are small, springs from the conviction back of it that liquor in any form, or in any sized packages, is not a legitimate subject of commerce. That question is put at rest by the decision of the Supreme Court of the United States until Congress shall act. *As long as packages of liquor, in any form or size, may lawfully be sold by the importer, or his agent, in a prohibition State, the size of the package is not of much consequence.*"

A citation of other authorities is unnecessary when the United States Supreme Court itself, in the very recent case of Schollenberger *v.* Pennsylvania, already cited, has disposed of the question. In that case the original package of oleomargarine was a package of ten pounds, a package suitable for the consumer and such as is ordinarily sold by a retail dealer to a consumer. This Court said, with reference to the distinction at-

tempted to be drawn between a sale at wholesale and one at retail:

> "We are not aware of any such distinction as is attempted to be drawn by the Court below in these cases, between a sale at wholesale to individuals engaged in the wholesale trade or one at retail to the consumer. How small may be an original package it is not necessary to here determine. We do say that a ten-pound package of oleomargarine, manufactured, packed, marked, imported and sold under the circumstances set forth in detail in the special verdict, was a valid sale, although to a person who was himself a consumer. * * *. *The right of the importer to sell cannot depend upon whether the original package is suitable for retail trade or not.* His right to sell is the same, whether to consumers or to wholesale dealers in the article, provided he sells them in original packages."

The authority in Schollenberger's case is irresistible as to this branch of the case at bar. A ten-pound box of oleomargarine is not materially larger, comparatively, than a ten-cigarette package of cigarettes. Each is an ordinary package for the consumer—neither one is such a package as a wholesaler would usually sell to a retailer by itself, and each is what ordinarily would be sold by a retailer to a consuming customer.

The methods and means used by the Express Company in getting the packages of cigarettes from Durham, North Carolina, to Madisonville, Tennessee, cannot affect the question as to whether these packages were or were not original packages. The basket used by the Express Company was in its possession before it received these

packages at all. Presumably it was the property of the Express Company, since presumptive title as to personalty follows the possession. When the Express Company received from the shippers these packages of cigarettes to carry to Madisonville, Tennessee, it had to deposit them somewhere, either in its car, or box in its car, or basket, or in some way. It chose a basket, but it never delivered that basket to the consignee, and it never received it from the shipper. The basket was its own receptacle as thoroughly as the express car would have been. But this method of carriage adopted, not by himself nor by the shipper, is given as one of the grounds for the holding that the consignee is to be denied his unquestioned Constitutional right to sell an undoubted import!

(*B*). Plaintiff in error, though, contends that the package he sold in this case is an original package, and, as such, an import, and that it would have retained its character as an import even if it had been enclosed with other packages of like kind for convenience of shipment, and he had broken the enclosure and taken one of the packages out. He contends that Congress has a right to prescribe what shall be an original package of any commodity with reference to which it legislates, and that the original package thus prescribed is an original package for all purposes.

Congress has prescribed, under heavy penalties, what shall be an original package of cigarettes, and the package sold by plaintiff in error in this case was such a package:

> "And provided, further, that every manufacturer of cigarettes shall put up all the cigarettes

that he either manufactures or has made for him, and sells *or removes for consumption or use*, in packages or parcels containing ten, twenty, fifty or one hundred cigarettes each, and shall securely affix to each of said packages or parcels a suitable stamp denoting the tax thereon, and shall properly cancel the same prior to such sale or removal for consumption or use, under such regulations as the Commissioner of Internal Revenue shall prescribe." * * * (*Rev. Statutes, Sec. 3392, as amended. Gould & Tucker's Notes, page 690.*)

"Every manufacturer of tobacco or snuff shall, in addition to all other requirements of this title relating to tobacco, print on each package, or securely affix, by pasting, on each package containing tobacco or snuff, manufactured by or for him, a label, on which shall be printed the proprietor's or manufacturer's name, the number of the factory, the district and State in which it is situated, and these words:

'NOTICE.—The manufacturer of this tobacco has complied with all the requirements of law. Every person is cautioned, under the penalties of law, not to use this package for tobacco again.'" (*Rev. Statutes, Sec. 3364.*)

It may be said, and it has been contended, that these statutes are Internal Revenue Statutes, and have nothing to do with commerce, but it is vain to say that any Congressional enactment does not have the effect that its words give, however codified and wherever such statute may be placed.

Besides these Internal Revenue provisions, Congress has expressly recognized and treated this prescribed

statutory package as the original package of commerce. Under the law at that time cigarettes were treated as cigars (Sec. 3387, Rev. Statutes, last line), and by Section 3381 of the Revised Statutes Congress provided, as to manufacturers of different forms of tobacco:

> "He shall neither sell, nor offer for sale, any tobacco, snuff or cigars, except in *original* and full *packages*, as the law requires the same to be prepared and put up by the manufacturer for sale, or for removal for sale or consumption, and except such packages of tobacco, snuff and cigars as bear the manufacturer's label or caution notice, and his legal marks and brands, and genuine Internal Revenue stamps which have never before been used."

Again, in the Act of March 3, 1883, Rev. Stat., Sec. 3381 (Chap. 121), by which the tax on cigarettes was reduced from $1.50 per thousand to $0.50 per thousand and the tax on other forms of manufacture of tobacco also reduced, Congress, in arriving at the rebate to be allowed dealers, holders of commercial articles while they were in the channels of commerce, provided:

> "That on all original and unbroken factory packages of smoking and manufactured tobacco and snuff, cigars, cheroots and cigarettes held by manufacturers and dealers at the time such reduction shall go into effect, upon which the tax has been paid, there shall be allowed a drawback or rebate of the full amount of the reduction." (*Amendment to Rev. Stat., Sec. 3355.*)

Such, too, was the construction of the law of the Commissioner of Internal Revenue, when the question

was squarely submitted to him, as shown by letter which is printed in the opinion of the court in the McGregor *v.* Cone, *supra:*

"WASHINGTON, D. C., April 6, 1893.

AMERICAN TOBACCO COMPANY,
No. 45 Broadway, New York, N. Y.

Gentlemen:

In reply to your inquiry of April 3d, submitting sample package of cigarettes bearing thereon the Internal Revenue stamp and the printed marks and caution label, and inquiring as to a necessity for re-enclosing in an additional covering of paper, wood or other material in placing the same upon the market, you are notified that said package, being a statutory quantity and properly stamped and canceled, and bearing thereon the caution label and number of the manufactory, the district, the State and the number of cigarettes contained therein, meets with the approval of this bureau, being a proper and original package, as contemplated by existing law and regulations.

Therefore, the repacking of said packages in additional covering of wood, paper, etc., is optional with the manufacturer and does not concern this bureau. This option is permissible under existing regulations, Series 7, No. 8 Revised, page 46, and Internal Revenue Record, Vol. 32, page 365, dated November 22, 1886.

Respectfully yours,

(Signed) JOHN W. MASON,
Commissioner."

This contention has been directly sustained in West Virginia, and besides the case in which it has been directly sustained, *dicta* have been in favor of it in various opinions. In State *v.* Goetze, *supra*, decided by the Supreme Court of West Virginia, the cigarettes were in packages similar to the package sold by plaintiff in error in this case, but these packages had been placed in a wooden box for shipment, and the Court held them to be nevertheless original packages, because so prescribed by Act of Congress. We quote the second paragraph of syllabus prepared by the Court:

> "Where cigarettes are manufactured in a sister State, and placed in paper boxes for convenience of transportation and sale, and such boxes are provided with a proper label, giving the name of the cigarette, the caution notice, the number of the factory, the number of the Revenue District, the name of the State in which they are manufactured, and the proper Internal Revenue stamp, duly cancelled, is pasted across the end of such package so as to seal the same in accordance with the requirements of the Act of Congress and sale of cigarettes, *such paper box must be regarded as an original package: and its character will not be changed by its being placed, with other boxes of the same kind, in a wooden box for shipment.*"

In the very recent case of Guckenheimer *v.* Sellers (81 Fed. Rep., 997) Circuit Judge Simonton, a very eminent and able Federal Judge, after discussing the immunity of the original package from the operation of the law under consideration, says the following, which, while it is *dicta*, is, considering the character of the Judge,

strongly in favor of the contention of plaintiff in error now being urged:

> "The original package only being protected under the law of interstate commerce, the question, what is an original package? is of grave importance. In arriving at a conclusion on this question, no aid is given from Acts of Congress *as is afforded in ascertaining what is an original package in the matter of cigarettes*, another article of interstate commerce which frequently clashes with police regulations. *Congress, in Sections 3381 and 3392 of Revised Statutes, has prescribed what shall be an original package of cigarettes.*"

The only case directly against this contention, and that discusses the point attempted to be made, to-wit: that this package is an original package because Congress says it is, is McGregor *v.* Cone, *supra*, decided by the Supreme Court of Iowa. And in that case the Court seemed to have fallen into the error of believing that the importer rested his case on the ruling of the Commissioner of Internal Revenue. Whatever might have been done in that case, the plaintiff in error in this case relies on a ruling of the Commissioner of Internal Revenue only as an incident, but he puts his faith in the statutes that Congress has passed, and, having sold cigarettes that complied with these statutes, he contends that he will be protected.

This contention is not at all in variance with the views of this Court expressed in Plumley's case, *supra*. In that case there was no question as to what was an original package—it was admitted that the package sold was an original package in the strictest sense. The only way in which the effect of Congressional legislation

came to be considered was in order to answer the contention of Plumley that Congressional legislation in relation to the inspection of oleomargarine had the effect of superseding any possible State legislation on the subject. The Court said that the contention was not sound—that Congress had in its enactment of the oleomargarine law expressly re-enacted Section 3243 Revised Statutes, already referred to in this brief, which provided that no payment of tax provided for by the internal revenue law should exempt one from the fines or penalties incurred by carrying on a business in a State in which the business was prohibited; that therefore the carrying on the business in accordance with the Act of Congress only exempts one from punishment by the general government, and does not exempt him from the effect of "any regulations which a State might lawfully prescribe in reference to that article."

With this holding, plaintiff in error has no quarrel. He admits that an inspection law, if it could be upheld at all, could be upheld notwithstanding the fact that the manufacturer had complied with the laws of Congress regulating the labeling and packing of the article. But the question here is not on an inspection law. It is not at all the question of Plumley's case. It is an attempt to enforce a law, certainly invalid as applied to sales in original packages, on the contention that this is not an original package at all. Plaintiff in error says, not that the law is invalid because Congress has already made regulations, but that so far as this package is concerned, it is entitled to all the rights of an original package, whatever they may be, because *Congress has declared it an original package*. This without adverting to the fact that the oleomargarine statute does not contemplate

transportation, while the cigarette statute has the significant words "*removes for consumption or use.*"

(*C*). Without losing sight of this contention that he will be protected in his sale because he sold a *statutory* original package, plaintiff in error desires to urge his contention that it is its *identifiability* as an import, and the fact that it is still in the channels of commerce, that gives to an import its immunity from State legislation that attempts to regulate or prohibit its sale.

Since the case of Brown *v.* Maryland (12 Wheat., 419) the phrase "original package" has been much used and given a most weighty significance. That phrase was born in the following paragraph of the opinion of Chief Justice Marshall, in Brown *v.* Maryland:

> "The Constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. *Till they do arise it might be premature to state any rule as being universal in its application.* It is sufficient for the present to say, generally, that *when the importer has so acted upon the thing imported that it has become incorporated and mixed up with*

> *the mass of property in the country*, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State, but while remaining the property of the importer, in his warehouse, in the *original form or package* in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

As will be observed, while the phrase "original package" has been taken as furnishing a universal rule for distinguishing between goods imported and those which have lost their quality as imports, the great jurist who originated the phrase explicitly refused to attempt to lay down any universal rule. What suggests the original package as being the import is that, in most articles, the breaking of that package destroys the distinctive character of the article and makes it so it is not, at least, *self-identifiable* as an import. When the barrel of flour, for instance, is opened, and the grocer deals it out in smaller quantities, it has become mingled with the rest of the property in the State, and the flour does not longer identify itself as coming from another State. When liquor is drawn from an imported barrel, and put in bottles, it ceases to be self-identifying as an import and becomes like the other property of the State. With cigarettes this is not so, at least as long as the package containing them is sealed with a revenue stamp, whose cancellation shows that the package is from without the State, and that the stamp and package are still intact. The stamp and package must, under the law, show the character of the cigarette as an import, for the law of the United States (Rev. Statute, Secs. 3381 and 3392) requires peremptorily that the manufacturer must

put on the package his cancellation of the revenue stamps, which cancellation and package shall show the place of manufacture and packing. As long as the package is in this shape it cannot be said that the "importer has so acted on the thing imported that it has become incorporated and mixed up with the mass of the property in the country."

This view, more or less consciously held, has given rise, in certain decisions, to the use of the phrase "sealed package" as the test words to distinguish the import from the property that has become mingled with the mass of property of the State. Thus, the Court, in *ex parte* Jervey (66 Fed., 957), a case decided after the Wilson bill, passed in 1890, had subjected liquors to the police powers of the several States, began a discussion of the effect of the Wilson bill as follows:

> "The right of the States under the police power to regulate, restrain, or forbid the use, sale and keeping of intoxicating liquors within their own boundaries had been fully established by a long line of authorities (Boston Beer Co. *v.* Massachusetts, 97 U. S., 25; Foster *v.* Kansas, 112 U. S., 201; Mulger *v.* Kansas, 123 U. S., 659; Crowly *v.* Christensen, 137 U. S., 91). But the decision of the same Court had declared that sealed packages were not within the police power. Instances were of constant occurrence in which importers would carry into a State whose laws forbade the sale of intoxicating liquors *sealed packages of convenient size*, which were sold in that condition, protected under these decisions. Thus the laws of the State were evaded and set at naught, and the humane desire of the legislation entirely de-

> feated. Every effort to destroy this evil failed, and finally, in Leisy *v.* Hardin, 135 U. S., 100, the Supreme Court declared the law *granting immunity to the sealed package*."

This Court, while it has frequently made use of the phrase "original package," has nevertheless intimated that something other must be done to clearly identified and self-identifiable imports besides breaking the package in which shipped before they can be said to have become commingled and mixed with the mass of property in the State. In Leisy *v.* Hardin, *supra*, this Court uses the following language, which, although heretofore quoted in another connection, we feel at liberty to quote again:

> "Under the decision in Bowman *v.* Railroad, *supra*, they had the right to import this beer into that State, and in the view which we have expressed they had the *right to sell it, by which act alone it would become mingled in the common mass of property within the State*."

And again, in the very recent case of Vance *v.* Vandercook, *supra*, Justice White, speaking for the Court, says:

> "* * * that the goods received by interstate commerce remained under the shelter of the interstate commerce clause of the Constitution *until by a sale* in the original package *they have been commingled with the general mass of property in the State*."

Then, after the delivery of the opinion in Leisy *v.* Hardin, but before the even more explicit statement in Vance *v.* Vandercook, Circuit Judge Goff, in Minor's

case, *supra*, a case involving the rights of the importer of the very articles involved in this case, says:

> "The right to purchase in one State carries with it the right to sell the article so purchased in another State, regardless of the State law, and independent of local interests and jealousies. Were this not so, the commerce between the States could be, and in many instances would be, entirely destroyed. *It is only by the sale of the imported article that it becomes mingled with the other property within the State.*"

Plaintiff in error contends very earnestly for a substantial and broad, instead of a narrow and technical, construction and enforcement of his Constitutional right. It is possible, under the conditions of trade, for cigarettes to be imported in the same package as is sold to a consumer, and without any enclosure about the package. But in some commodities this is not so. If the framers of the Constitution meant, by committing the regulation of interstate commerce to Congress, what Brown *v.* Maryland, Bowman *v.* Railroad, Leisy *v.* Hardin, and the other great cases have said they did, then they meant to confer a real and substantial privilege upon the citizen, and to commit a real and substantial power to the general Government. This privilege to the citizen is to buy an article from one State and sell it in another, free from the prejudices and local interests and jealousies of the latter State. If the State cannot prohibit, nor embarrass by taxation, the sale of an imported article, it ought not to be permitted to embarrass, destroy or prohibit commerce in it by necessitating unusual, expensive and sometimes impossible methods of shipment. As to its own internal affairs, let the State be supreme,

but as to commerce the General Government should be jealous and exclusive in its supremacy. If it is to be so, the importer, whether from a foreign land or another State, must be permitted to sell his import absolutely free from local jealousies, or prejudices, or interests, and the State must not be permitted to prevent the importation and sale, nor to *inconvenience or embarrass the importer*. The thing imported should be permitted to be sold, even if the enclosure put about it for convenience of shipment is removed, and this permission should continue until by a sale the article has been commingled with other property of the State, or until by a breaking of the *original package of manufacture*, or otherwise, the article has lost its identity as an import, and has been so acted upon "that it has been incorporated and mixed up with the mass of the property in the country." Thus held, the adjudications of this Court on this interesting question become logical, reasonable and purposeful. Thus held, the words of Justice Bradley in Stockton *v.* Railroad (32 Fed. Rep., 9) become true, in form and substance.

> "We think that the power of Congress is supreme over the whole subject of interstate commerce, *uninterrupted and unembarrassed by State lines or State laws*. On this matter the country is one, and the work to be accomplished is national; and State jealousies, State prejudices and State interests do not require to be consulted. *In matters of foreign and interstate commerce there are no States.*"

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